

JOHN J. PHELAN, III, P.C.

ATTORNEY AT LAW

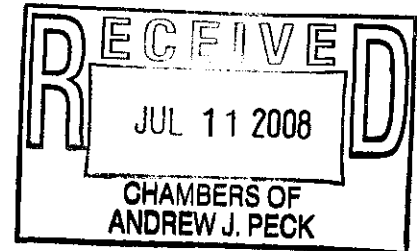
1285 AVENUE OF THE AMERICAS, Suite 3500

NEW YORK, NY 10019

PHONE (212) 315-3082
Fax (212) 315-3028

e-mail: jphelaniii@ATT.Net

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC#
DATE FILED: 7/16/08



July 11, 2008

Via Fax (212) 805-7933

Hon. Andrew J. Peck
U.S. Magistrate Judge
United States District Court
Southern District of New York
U.S. Courthouse, Room 1370
500 Pearl Street
New York, NY 10007

MEMO ENDORSED - *ps*

Re: Procapui v. Layani et al. 07 Civ. 6627

Dear Magistrate Judge Peck:

In the Order dated June 10, 2008, the Court directed that the stay of discovery remained in effect for depositions but that the parties should complete "paper" discovery within thirty days and should report by jointly today, July 11 on the status of discovery and any agreement reached between the parties concerning a plan to complete.

The purpose of this letter is to make such report. The letter has been reviewed by Mr. DeMaio and he has agreed to its content.

The Higgins parties have completed the production of all documents requested of them. A disk containing the final documents was sent to counsel on Thursday and copies of documents reflecting communications with Defendant Layani will be delivered on Monday. As of the date of this letter, Mr. DeMaio has not received the documents and, therefore, his position as to their contents is not reflected herein.

The Plaintiff last delivered documents on December 18, 2007 and there have been none since. No bank statements of either Procapui or Anavian have been produced. Mr. DeMaio has

acknowledged that there are certain documents which have arisen after the last production and he has agreed to supply the same to me next Monday together with a report on his ability to locate or to obtain bank statements for Procapui and Mr. Anavian. In the event that such statements cannot be located, we have agreed to subpoena the appropriate banks.

The Higgins parties have subpoenaed four banks and Merrill Lynch for statements of accounts of various parties and witnesses. Three of those have been responded to and the fruits are being provided to all counsel. Procapui and Anavian have subpoenaed several banks as well prior to the stay of discovery. Two corporate witnesses complied just at the time the stay was imposed and all parties now have those documents. Plaintiff and Anavian have now requested that the remaining banks honor the subpoenas and produce the records subpoenaed. It is not known when this will occur.

Plaintiff has, to date, not provided the calculation of damages required by Rule 26 to be presented at the very outset of any case which was filed on July 24, 2007. However, Mr. DeMaio has stated that he is still awaiting certain documents from Procapui's accountant and will supply that damage calculation next week.

The Higgins parties served a Request to Admit on December 16, 2007 which has not been responded to. There was, of course, a stay of discovery in effect from January 11, 2008 until February 21, 2008. The request to admit seeks to learn exactly which payments made by the Higgins parties over the life of their business dealings were or were not received directly or indirectly by Procapui, a matter at the heart of Procapui's contentions that many of Higgins' payments were diverted to others. Mr. DeMaio and I have discussed that the Procapui bank statements would greatly simplify the response to the Notice to Admit and we have agreed to defer that response for a brief reasonable time to ascertain whether said bank statements can be obtained. When Mr. DeMaio reports on Monday as to his efforts to locate bank statements, we will be in a better position to estimate what that reasonable time will be.

Turning now to the plan for completing discovery, what will remain after the above is the taking of depositions which are stayed for the present. The Higgins parties seek the deposition of Anavian as well as the depositions of five or six other persons who are or were associated or employed by Procapui or Anavian, all except one of whom reside in Europe, Israel or Brazil. The Higgins parties do not require those depositions unless those persons are to testify at trial on behalf of Procapui or Anavian and do not presently intend to travel to foreign countries to depose them. Mr. DeMaio has agreed that, if he calls any of them at trial, he will make them available for deposition at least a week before trial.

Plaintiff and Anavian intend to take the depositions of

Jozef Anavian

Rita Zahabian

Michael Donnelly

Robert Higgins

Thomas Higgins

Certain of the subpoenaed banks should the documents make such depositions necessary;

Certain customers of Higgins should the documents make such depositions necessary.

In addition to the above, subject to the above, the Higgins parties will take the depositions of Leyla Anavian, Mr. Sidou, the Brazilian accountant, as well as any document or record custodian or accountant or other person providing or authenticating any documents or information on behalf of Plaintiff or Anavian as well as any other person listed as a witness on Procapui's Rule 26 disclosures.

Each party reserves the right to make such motions as may be necessary to address any discovery problems once the above document productions, requests to admit and Rule 26 disclosures are provided.

Thank you very much.

Very truly yours,

John J. Phelan, III

cc. via email

Luigi DeMaio, Esq.:
Attorney for Plaintiff

Lawrence R. Lonergan, Esq.:
Attorney for Defendant Rubin

Defendant Noel Blackman:

MEMO ENDORSED

Follow up status report due 7/30.
Next report should also address
whether the stay of depositions should be
lifted - which is the Court's inclination.

SO ORDERED:

Hon. Andrew Jay Beck
United States Magistrate Judge

BY FAX

any 4/27/08: HJ Court
J. J. Jones

FAX TRANSMITTAL SHEET



**ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT**

Southern District of New York
United States Courthouse
500 Pearl Street, Room 1370
New York, N.Y. 10007-1312

Fax No.: (212) 805-7933
Telephone No.: (212) 805-0036

Dated: July 16, 2008

Total Number of Pages: 4

TO	FAX NUMBER
Luigi P. De Maio, Esq.	212-889-1391
John J. Phelan, III, Esq.	212-315-3028
Lawrence R. Lonergan, Esq.	212-366-6950
Noel J. Blackman	281-256-9433

TRANSCRIPTION:

MEMO ENDORSED 7/16/08

Follow-up status report due 7/30. That report should also address whether the stay of depositions should be lifted – which is the Court's inclination.

Copy to: Judge Barbara S. Jones